

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of:)	
)	
Paragon Communications, Inc.)	CSR-5901-E
d/b/a Time Warner Cable)	
)	
Petition for Determination of Effective)	
Competition in Gardena, California (CA0934))	

MEMORANDUM OPINION AND ORDER

Adopted: December 13, 2002

Released: December 27, 2002

By the Deputy Chief, Media Bureau:

I. INTRODUCTION

1. Paragon Communications, Inc. d/b/a Time Warner Cable ("Time Warner") has filed with the Commission a petition (the "Petition") pursuant to Sections 76.7, 76.905(b)(4) and 76.907 of the Commission's rules seeking a finding of effective competition in Gardena, California ("Gardena"). Time Warner alleges that its cable system serving Gardena is subject to effective competition pursuant to Section 623(a)(2) of the Communications Act of 1934, as amended ("Communications Act"),¹ and the Commission's implementing rules,² and seeks revocation of the certification of the local franchising authority in Gardena to regulate basic cable service rates. Time Warner claims the presence of effective competition in Gardena stems from the competing services provided by RCN Telecom Services, Inc. ("RCN"), a franchised cable operator that also provides local exchange carrier ("LEC") service in Gardena.³ No opposition to the Petition was filed.

II. DISCUSSION

2. In the absence of a demonstration to the contrary, cable systems are presumed not to be subject to effective competition,⁴ as that term is defined by Section 76.905 of the Commission's rules.⁵ The cable operator bears the burden of rebutting the presumption that effective competition does not exist with evidence that effective competition is present within the relevant franchise area.⁶ Based on the

¹ 47 U.S.C. § 543(a)(2).

² 47 C.F.R. § 76.905.

³ 47 U.S.C. § 543(a); 47 C.F.R. § 76.905(b)(4).

⁴ 47 C.F.R. § 76.906.

⁵ 47 C.F.R. § 76.905.

⁶ See 47 C.F.R. §§ 76.906-907.

record in this proceeding, Time Warner has met this burden.

3. Section 623(l)(1)(D) of the Communications Act provides that a cable operator is subject to effective competition, and therefore exempt from cable rate regulation, if a LEC or its affiliate offers video programming services directly to subscribers by any means (other than direct-to-home satellite services) in the franchise area of an unaffiliated cable operator which is providing cable service in that franchise area, provided the video programming services thus offered are comparable to the video programming services provided by the unaffiliated cable operator in that area.⁷

4. The Commission has stated that an incumbent cable operator could satisfy the LEC effective competition test by showing that the LEC is technically and actually able to provide services that substantially overlap the incumbent operator's service in the franchise area.⁸ The incumbent also must show that the LEC intends to build out its cable system within a reasonable period of time if it has not already done so, that no regulatory, technical or other impediments to household service exist, that the LEC is marketing its services so that potential customers are aware that the LEC's services may be purchased, that the LEC has actually begun to provide services, the extent of such services, the ease with which service may be expanded and the expected date for completion of construction in the franchise area.⁹

5. Time Warner operates a cable television system in Gardena for which it seeks a determination of effective competition. Time Warner has provided information demonstrating that RCN is a telephone company that provides local exchange and other telephone services within Gardena.¹⁰ Therefore, RCN qualifies as a LEC for purposes of the LEC effective competition test.¹¹

6. In addition to qualifying as a LEC, RCN was awarded a franchise for the provision of cable service within Gardena.¹² Time Warner estimates that RCN's cable system currently passes all of the 20,324 households in the franchise area.¹³ Time Warner demonstrates that there are no regulatory, technical or other impediments to RCN's provision of cable service within Gardena.¹⁴ As to whether RCN provides cable service that substantially overlaps that of Time Warner, RCN's franchise contains a requirement to provide cable service throughout Gardena within twenty four months of the franchise's effective date, or otherwise be subject to fines and forfeitures.¹⁵ This requirement, combined with RCN's existing service to nearly 500 subscribers, evinces its offering of service in Gardena.¹⁶ We find that Time

⁷ 47 U.S.C. § 543(1)(1)(D); *see also* 47 C.F.R. § 76.905(b)(4). This fourth statutory effective competition test within Section 632(l) is referred to as the "LEC" effective competition test.

⁸ *See Implementation of Cable Act Reform Provisions of the Telecommunications Act of 1996*, 14 FCC Rcd 5296, 5305 (1999) ("Cable Reform Order").

⁹ *Id.*

¹⁰ Petition at 2.

¹¹ *See* 47 U.S.C. § 543(1)(1)(D); 47 U.S.C § 153(a)(1).

¹² Petition at 4.

¹³ *Id.*

¹⁴ *Id.* at 5.

¹⁵ *Id.* at Exhibit C.

¹⁶ *Id.* at 4.

Warner has demonstrated that RCN's operations in Gardena substantially overlap those of Time Warner.

7. RCN has widely distributed marketing materials throughout Gardena, pointing out that residents need only call RCN for installation of its cable services.¹⁷ These marketing materials demonstrate that its cable service offers over 200 channels of video programming that includes non-broadcast programming services such as ESPN, HBO, CNN, as well as a complement of local television broadcast stations, such as KNBC-TV (NBC), KABC-TV (ABC), and KCBS (CBS).¹⁸ Therefore, RCN provides comparable programming as required by the LEC effective competition test.

8. Time Warner has demonstrated that RCN has commenced providing cable service within Gardena, has marketed its services in a manner that makes potential subscribers reasonably aware of its services, and otherwise satisfied the LEC effective competition test consistent with the evidentiary requirements set forth in the *Cable Reform Order*.¹⁹ Based on the foregoing, we conclude that Time Warner has submitted sufficient evidence demonstrating that its cable system serving Gardena is subject to LEC effective competition.

III. ORDERING CLAUSES

9. Accordingly, **IT IS ORDERED** that the petition filed by Paragon Communications, Inc., d/b/a Time Warner Cable for a determination of effective competition in Gardena, California **IS GRANTED**.

10. **IT IS FURTHER ORDERED** that the certification to regulate basic cable service rates of Gardena, California **IS REVOKED**.

11. This action is taken pursuant to delegated authority pursuant to Section 0.283 of the Commission's rules.²⁰

FEDERAL COMMUNICATIONS COMMISSION

William H. Johnson
Deputy Chief, Media Bureau

¹⁷ *Id.* at 5 and Exhibit A.

¹⁸ *Id.* at 6 and Exhibit A.

¹⁹ See *Cable Reform Order*, 14 FCC Rcd at 5305.

²⁰ 47 C.F.R. § 0.283.